

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of

Gen Docket No. 90-314
RM-7140, RM-7175, RM-7618

Amendment of the Commission's
Rules to Establish New
Personal Communications
Services

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**COMMENTS OF THE
PCS LICENSING EQUITY ALLIANCE**

The PCS Licensing Equity Alliance ("PLEA"), by its attorneys, hereby responds to the Federal Communications Commission's (the "Commission's") invitation to submit comments on the Panel Discussions held on April 11-12, 1994 by the PCS Task Force regarding the Commission's Second Report and Order in the above captioned proceeding.^{1/}

I. Background and Preliminary Statement

More than 300 small businesses, businesses owned by women and minorities, and rural telephone companies (the "designated entities") have formed the PCS Licensing Equity Alliance ("PLEA") to urge the Commission to create a regulatory framework which will ensure that designated entities have genuine opportunities to participate in the personal communications services ("PCS") revolution. PLEA is committed to translating the promise of PCS into the reality of new jobs, economic growth and new consumer

^{1/} These Comments are timely pursuant to the Commission's News Release dated April 4, 1994.

products if simply given the chance. Attachment A contains a listing of PLEA's members.

In the Omnibus Budget Reconciliation Act of 1993^{2/} (the "Budget Act"), Congress authorized the Commission to auction spectrum licenses for emerging technologies, thus creating a major new source of Federal revenue. In that Act, Congress also explicitly sought to foster economic growth among segments of the population and in regions of the country which historically have not benefitted fully or fairly from technological innovation by directing the Commission to ensure that designated entities are given the opportunity to participate in spectrum based services.

PLEA files these comments to augment the Commission's Panel Discussions regarding the unique needs of designated entities in light of Congress' mandate to ensure that they are afforded genuine opportunities to participate in emerging spectrum-based industries such as PCS. The need to supplement the record is especially acute because Panel II, "Competitive Issues in the Wireless Communications Market", failed to include an economist representing the designated entity community -- an omission which became painfully significant both substantially and procedurally as each economist on that panel disclosed which large, entrenched communications provider(s) they have already represented on the record in this proceeding. With this background, PLEA urges the

^{2/} Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

Commission to implement its statutory mandate faithfully and effectively.

To that end, PLEA advocates the issuance of Commission regulations that: (1) set aside a minimum of 30 MHz of spectrum for exclusive auctioning among designated entities, with at least 20 MHz in the lower PCS spectrum band; (2) guarantee that designated entities need make only a minimum financial commitment when a PCS license is awarded, and benefit from flexible financial arrangements to pay for the PCS license and the freedom to raise capital without artificial restraints imposed on them by the Commission; and (3) eliminate any delay in the licensing of PCS. These three proposals are mutually reinforcing and are each necessary to effectuate Congress' intent in authorizing the Commission to auction PCS licenses.

II. The Commission Must Set Aside PCS Spectrum for Designated Entities

The economic barriers that designated entities face in obtaining capital necessary to acquire PCS licenses and construct and operate PCS systems are insurmountable absent a spectrum set-aside. The Congressional Budget Office ("CBO") has estimated that at least \$35 - \$37 per person in capital costs and initial operating losses will be needed to make an after-tax return of 13 to 15 percent, given a 20-25 MHz spectrum license. Based on these projections, at least \$155 million will be needed to acquire, construct and operate a profitable PCS system for the Washington Basic Trading Area ("BTA"). Under CBO's analysis, \$64

million (\$15 per person) of the total amount necessary to deploy a PCS system would be needed just to acquire the PCS license through an auction. This sum of capital to acquire and build out just one PCS system has traditionally been prohibitive for designated entities to raise.

To overcome this threshold obstacle and to ensure that the Commission disseminates PCS licenses among a diverse pool of applicants, as required by Congress, it is critical that the Commission set aside a minimum of 30 MHz of spectrum, with at least 20 MHz in the lower PCS spectrum band, for exclusive licensing to designated entities.

The Commission has a history of using set-asides to promote policy goals in the communications industry. For example, the Commission set aside one of the two cellular licenses for exclusive licensing to wireline carriers to expedite the initiation and deployment of cellular service, to relieve the serious congestion existing on two-way radio mobile systems, to ensure deployment of rural cellular service by rural telephone companies and to minimize licensing delay. A set-aside designed to increase the economic opportunity for designated entities is consistent with past Commission practice and furthers an overarching social and economic policy objective.

The set-aside advocated by PLEA is constitutional. The designated entity classification, rather than one based solely on

race or gender, is a classification based on an economic rationale -- the need for providing designated entities economic opportunity to compete in offering spectrum-based services. Because there is a rational basis for the Commission to adopt set-asides to achieve Congress' objective of providing economic opportunity for designated entities and given Congress' broad powers to legislate in areas of social and economic policy, a designated entity set-aside is constitutionally permissible. See, F.C.C. v. Beach Communications, Inc., 113 S.Ct. 2096 (1993).

To the extent that a set-aside for designated entities does encompass race and gender based factors, however, it still will be upheld if it (1) serves important government objectives within the power of Congress and (2) is substantially related to those objectives. Metro Broadcasting v. F.C.C., 110 S.Ct. 2997, 3009 (1990); Mississippi University for Women v. Hogan, 102 S.Ct. 3331 (1982). Both prongs of the Metro Broadcasting test would be satisfied here.

Congress' purpose in mandating preferential measures in the 1993 Budget Act was to provide economic opportunities for businesses owned by minorities, women and other designated entities to participate in the telecommunications businesses for which licenses would be issued by auction. The Supreme Court has determined that creating economic opportunities for minority businesses and women is an important governmental purpose. Fullilove v. Klutznick, 100 S.Ct. 2758 (1980) (the Court upheld

the minority preference provision of the Public Works Employment Act of 1977 which contained a set-aside of 10 percent of public funds for minority-owned businesses, finding that Congress' goal of providing the minority business community an economic stimulus was an important governmental purpose); Califano v. Webster, 97 S.Ct. 1192 (1977) (the Court held that reducing the disparity in economic condition between men and women caused by the long history of discrimination against women is an important governmental objective). See also, Adarand Constructors v. Peña, 1994 U.S. App. LEXIS 2832 (10th Cir. Feb. 16, 1994) (the court held the Department of Transportation's provision of subcontracting opportunities for small disadvantaged businesses was an important governmental objective); Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, 112 S.Ct. 875 (1992), reh'g denied 112 S.Ct. 1307 (1992) (the Court upheld King County's use of a women-owned business set-aside to remedy the many disadvantages that confront women business-owners).

The second prong of the Metro Broadcasting standard requires the set-aside to be substantially related to the important governmental objective of promoting economic opportunity for minorities. Without a set-aside, businesses owned by minorities, women, small businesses and rural telephone companies will have to battle entrenched, well-heeled, communications providers just to obtain a PCS license -- a battle they are virtually certain to lose absent a set-aside, given the considerable amount of capital

necessary to obtain a PCS license and to build out a PCS system. Therefore, spectrum set-asides are indispensable to effectuating legitimate Congressional objectives and are narrowly tailored so as to be constitutionally sound.

Neither can a spectrum set-aside for designated entities be attacked properly on grounds that it would cost the government money. Congress specifically prohibited the Commission, in prescribing its competitive bidding regulations, from basing a finding of public interest solely or predominantly on the expectation of increased Federal revenues. Congress determined that the dominant economic consideration should be fostering economic opportunity for those businesses disadvantaged by a lack of capital and traditional access to capital. Moreover, there will be considerable competition among the designated entities to obtain these set-aside licenses. Thus, any argument that use of set-asides will decrease the amount of revenue flowing to the U.S. Treasury has no place in this debate.

III. Favorable Financing Mechanisms for Designated Entities

Use of a set-aside to provide designated entities the opportunity to provide PCS is necessary, but not sufficient. The Commission also must adopt financing mechanisms applicable to the designated entities that consider the high cost of capital designated entities face due to their smaller asset base, start-up nature in providing communications services or rural service area. A higher cost of capital dictates a higher cost structure

to provide the same services as those provided by large, entrenched communications entities.

To combat this higher cost of capital, the Commission must ensure that a minimum financial contribution is required for the designated entity to obtain the PCS license. As demonstrated earlier, the cost to acquire a single PCS license could range between several million dollars to well over 100 million dollars.

Small businesses also should have the opportunity to pay the Commission its winning bid amount (less the initial up-front amount necessary to participate in the PCS license auction) over an extended period of time. Payments should not be due until the small business actually begins to offer PCS services, so that it has the necessary cash flow to make the payments. Further, PLEA urges the Commission to broaden its small business definition to take into consideration the capital intensive nature of the broadband PCS industry and the higher cost of capital faced by small businesses.

Moreover, the Commission must provide designated entities the ability to use flexible financing arrangements to construct and operate viable PCS systems. Specifically, the definitions adopted for each designated entity should not exclude the use of a broad array of financing instruments and arrangements, including both debt and equity instruments, to raise the necessary capital to offer PCS.

The Commission also should permit designated entities to form strategic alliances or joint ventures with partners that can offer them either the necessary level of capital or experience, or both, without jeopardizing their designated entity status. Moreover, tax certificates should be available to attract start-up capital and to encourage licensees to transfer PCS licenses to firms owned by designated entities. The Commission's regulations must encourage new entrants to succeed in the PCS industry, not place artificial restraints on their ability to raise the necessary capital to grow and prosper.

IV. Further Delay in Licensing PCS Will Be Harmful

Further delay in licensing PCS, beside being contrary to Congressional intent, is only in the interest of those large, entrenched communications providers that face new competition from PCS. Delay will only make PCS licenses less attractive, resulting in lower prices on the auction block. Congress recognized this fact and directed the Commission to issue its PCS report and order by February 7, 1994 and to commence issuing PCS licenses by May 7, 1994. With the former task complete, the latter task should now proceed expeditiously.

Further delay is particularly injurious to designated entities. Investor interest in PCS is very strong now. Additional delay will undermine investor confidence and make venture capital more scarce for designated entities. Not only will designated entities find it harder to gain market share as

existing wireless communication providers offer PCS-like services, but consumers of existing wireless services will not receive the full benefits of a competitive marketplace.

Large communications providers always will have the capital necessary to offer PCS. If necessary, the Commission should bifurcate its reconsideration of its PCS Order and permit PLEA's proposals to go forward, while it reconsiders outstanding contentious issues among the large, entrenched communications players. By bifurcating its reconsideration proceeding and licensing the designated entities in the set-aside blocks, the Commission would be providing designated entities the genuine economic opportunity envisioned by Congress.

V. Additional Benefits of Full Participation by Designated Entities

Commission adoption of PLEA's proposals, in addition to providing designated entities genuine economic opportunity, will result in numerous ancillary benefits including increasing the diversity of services offered, bringing the PCS revolution to rural areas and creating a bulwark against excessive concentration of ownership in the communications industry.

Small entrepreneurial businesses have been the engines of job growth in the U.S. and have been at the forefront of technological innovation. For example, without the technological advancements made by potential wireless communications providers, cellular providers would have had far less incentive to upgrade

their infrastructure to digital technology as they are currently doing. The Nation's international competitive position will be strengthened by further technological innovation and advances provided by the designated entities.

Ensuring small businesses, minorities and rural telephone companies a PCS license in each geographic market is wholly consistent with past practice and is vital to America's continued economic development in both urban and rural areas. Indeed, rural telephone companies are leading the deployment of an advanced communications infrastructure to rural America.

Diversity of viewpoint will be expanded by disseminating PCS licenses among small businesses, rural telephone companies and businesses owned by minorities and women. It can no longer be assumed that a PCS entity, as a commercial mobile radio service provider, does not have a First Amendment right to freely express its viewpoints across its common carrier network as a recent federal court determined. Consistent with this First Amendment right, designated entities will have the opportunity to offer an array of diverse services and expressions that promote the widespread acceptance of PCS among segments of the population and in regions of the country which historically have not benefitted from technological innovation. Set-asides and the use of a set of favorable financing tools will ensure that diversity in communications services continues to expand.

Diversity of ownership will satisfy the Congressional mandate to avoid a concentration of licenses among a few "deep pocket" entities. By disseminating licenses among a wide pool of applicants, the threat of excessive ownership concentration in the hands of a few giant companies that are already dominant forces in the communications industry will be diminished. Designated entities will be afforded the economic opportunity that competitive bidding was designed to offer.

VI. Conclusion

PLEA urges the Commission to implement faithfully and effectively Congress' mandate to provide economic opportunity to designated entities when it auctions PCS licenses. To surmount the capital formation barrier to entry that designated entities face, PLEA urges the Commission to set-aside at least 30 MHz of spectrum, with no fewer than 20 MHz in the lower band of PCS frequencies for exclusive auction among designated entities; adopt minimum financial commitments and flexible financial arrangements for designated entities to pay for their PCS licenses and ensure no artificial restraints are imposed on their ability to raise and obtain capital and experience to construct and operate PCS systems; and proceed without further delay to conduct PCS auctions and commence PCS deployment.

These proposals are consistent with past Commission precedent. The proposals recognize that small businesses have been the engines of job growth in the U.S. and have been at the

forefront of technological innovation. Moreover, diversity of viewpoint will be expanded by adopting proposals which will result in the dissemination of PCS licenses among designated entities in all regions of the country.

Respectfully submitted,

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"PLEA"

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ATS Telephone & Data Systems, Inc.
Broadband Communications Corporation
Business Service Center Inc.
Carolina Wireless Corporation
Choice Cellular
Columbia PCS, Inc.
Communications International Wireless,
Inc.
Corporate Telemanagement Group
Council Grove Telephone Company
Davison, Cohen & Co.
Dynaco
Essex Communications Partners
First Century Partners
Firstcom , Inc.
Freeman Engineering Associates
Hi-Tech Communications, Inc.
Illinois Wireless Communications
Corporation
Infinity Wireless Communications, Inc.
International Microwave
Intronics

Kycom, Inc.
Mercury Communications
Midwest Mobile Communications
Minnesota Equal Access Network
Services, Inc. (57 members)
Mobile Telcom Corp.
Netwave Systems, Inc.
North American Communications Corp.
Pacific Communications
Paramount Wireless
Personal Network Services
Pegasus Capital Management
Pratt Group, Inc.
Sequel Concepts, Inc.
Small Business PCS Association
Starlink
Technology Engineering Co.
Telamon Corp.
Tel/Com, Inc.
Telepoint Personal Communications, Inc.
Teltec
Transition Technology Corp.
U.S. Intelco Networks, Inc. (280+
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Wisconsin Wireless Communications
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CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, hereby certify that on this 22nd day of April, 1994, a copy of the foregoing "Comments of the PCS Licensing Equity Alliance" was served by first class United States mail, postage prepaid on the following parties:

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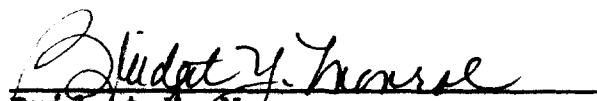
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